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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1966.

No.

CHARLES SHERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on January 30, 1967.

OPINIONS BELOW.

There was no opinion filed by the United States District Court for the Eastern District of Pennsylvania. The opinion of the Court of Appeals for the Third Circuit affirming the conviction of petitioner is not yet reported.

JURISDICTION.

The opinion of the Court of Appeals for the Third Circuit was filed on January 30, 1967, and a copy thereof is appended to the petition in the appendix at page 11. The Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States executed an order extending petitioner's time to file Petition for Writ of Certiorari on March 2, 1967. The jurisdiction of this court is invoked under 28 U. S. C. Section 1254(1).

QUESTION PRESENTED.

Petitioner was charged with a federal crime, theft from interstate shipment. He appeared with counsel before the District Court for the Eastern District of Pennsylvania on the date set for his trial, January 7, 1966. At this time it was brought to the Court's attention that petitioner's counsel was professionally engaged in the Common Pleas Court of Philadelphia and would be unable to appear with petitioner until the next Wednesday or Thursday, January 12th or 13th. The Court informed petitioner that his trial would begin Monday, January 10, 1966, and if he was without counsel at that time he would be remanded to custody and counsel would be appointed by the Court. Petitioner appeared Monday, January 10, 1966 with a young associate of his former counsel. A jury trial resulted in a verdict of guilty and petitioner was sentenced to five years imprisonment. The Court of Appeals affirmed. The Question presented is:

1. Was the petitioner deprived of a fair opportunity and reasonable time to select his own counsel in violation of the Sixth Amendment when he was informed on Friday, January 7, 1966 that his retained counsel could not appear for him at a trial to be held during the next week and he was subsequently placed on trial on Monday, January 10, 1966, with another counsel not of his choosing?

CONSTITUTIONAL PROVISIONS INVOLVED.

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy . . . the assistance of counsel for his defense." *U. S. C. Constitution, Amend. 6.*

STATEMENT OF THE CASE.

Petitioner was charged in an indictment returned on April 28, 1965 with violation of 18 U. S. C. Section 659, theft from interstate shipment. Mr. Thomas Gilson, a former United States attorney, who was representing petitioner in another matter, agreed to represent him in the defense of this federal offense. Petitioner was continued free on bail on May 25, 1965. On January 5, 1966, at the call of his case for trial, petitioner appeared without counsel. The Court revoked bail and petitioner was remanded to custody. Subsequently, on Friday, January 7, 1966, Mr. Gilson appeared with petitioner and requested a short continuance because of his engagement in a trial in the local Philadelphia courts. Petitioner's counsel explained that the trial in the local state court would probably continue until the following Wednesday or Thursday. Without technically ruling on the motion for a continuance, the Court informed petitioner that his trial would begin Monday, January 10, 1966, and furthermore, if petitioner appeared without counsel he would be remanded to custody and the Court would appoint counsel for him.

On Monday, January 10, 1966, petitioner appeared with new counsel, an associate of his former counsel. Petitioner did not object to representation by new counsel in open court. However, it is quite apparent from the Court's remarks of Friday, January 7, 1966 that objection would have been futile. In any event, petitioner was forced to trial with counsel not of his choosing. The trial, tainted with prejudicial tactical error by petitioner's young and inexperienced counsel, resulted in a verdict of guilty. Petitioner was sentenced to five years imprisonment after the Court denied his motions for Judgment N. O. V. and New Trial.

Petitioner then appealed to the United States Court of Appeals for the Third Circuit on the ground that he was denied a fair opportunity and reasonable time to obtain counsel of his own choice. The Court of Appeals in a per curiam opinion affirmed the judgment of the District Court.

Petitioner now seeks Certiorari to review the same question.

REASONS FOR GRANTING OF WRIT.

The decision below should be reviewed because it is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *United States v. Johnston*, 318 F. 2d 288 (6th Cir. 1963).

1. In *United States v. Johnston, supra,* a co-defendant, one Balk, was convicted of violation of and conspiracy to violate a mail fraud statute. Balk had retained counsel, but when the time came for his trial his counsel was engaged professionally before the Michigan Supreme Court. The District Court insisted on going ahead with trial because of the substantial expense a continuance would entail. As a result, defendant Balk was ably represented by another attorney, in fact, a close associate of his former counsel and a man of extensive trial experience. On appeal from his conviction, the United States Court of Appeals for the Sixth Circuit reversed the District Court and held: the defendant was deprived of fair opportunity and reasonable time to select his own counsel in violation of the Sixth Amendment when he was placed on trial on Tuesday with another counsel not of his choosing after being informed on the prior Friday that the counsel he had employed could not appear for him. The Court of Appeals held the District Court's action was a violation of the Sixth Amendment without a showing of prejudice or injury.

In our case, the petitioner was informed on Friday, January 7, 1966 that his retained counsel could not appear for him at trial (14a). The District Court ordered petitioner to trial on Monday, January 10, 1966 (14a) and told him that his appearance without counsel on that date would result in revocation of bail and appointment of counsel by the Court (15a). This action effectively deprived petitioner of a fair opportunity and reasonable time to secure his own counsel within the meaning of the decision of the

Court of Appeals for the Sixth Circuit in *United States v. Johnston, supra.* The Court's action of Friday, January 7, 1966 made it impossible for petitioner to refuse the offer of a young associate by his former counsel. It is quite clear that had he appeared on Monday, January 10th, without counsel, he would have been remanded to custody and counsel would have been appointed. If petitioner would have waited and objected in open court to his representation by his former counsel's young associate, the Court could only follow one of two courses. First, if he appeared without counsel the Court could have remanded him to custody and appointed counsel, or, second, the Court could have forced the petitioner on trial with the associate of his former counsel as the Court did in *United States v. Johnston, supra.*

In any event, the decision of the Court of Appeals for the Third Circuit in the instant case, in affirming the action of the District Court which effectively deprived petitioner of his fair opportunity and reasonable time to select his own counsel, is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *United States v. Johnston,* 318 F. 2d 288 (6th Cir. 1963).

2. The question presented by this case is of great importance to the administration of criminal justice in the Federal Courts. While many recent cases have dealt with the criminal defendant's right to counsel, the accused's right to a fair opportunity and reasonable time to secure counsel of his choice is a relatively untouched area. Primarily the Federal Trial Courts need definitive direction as to the procedure to be followed where a defendant has the financial ability and desire to retain counsel of his own choice.

Admittedly, a delicate balancing of interests is involved. On one hand, the Federal Courts must be able to administer criminal justice in a fair, orderly and swift manner. On the other hand, the individual accused of crime

must be given the opportunity to secure counsel of his own choice. A question of this importance is ripe for review and decision by the Supreme Court of the United States. Already two of the Circuits have split in cases involving this question. A definitive decision by the Highest Court of the Land will prevent confusion and injustice and will provide a meaningful guide for all the lower Federal Courts for handling of this problem.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

THOMAS F. GILSON,
SEYMOUR KANTER,
Counsel for Petitioner.

APPENDIX A.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 22116.

UNITED STATES OF AMERICA

v.

CHARLES SHERMAN, A/K/A "SHIKE".

JUDGMENT AND COMMITMENT.

On this 11th day of February, 1966 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of NOT GUILTY and a verdict of GUILTY of the offense of theft from interstate shipment as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS. Parole Report Required.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Harold K. Wood,
United States District Judge.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15788

UNITED STATES OF AMERICA

v.

CHARLES SHERMAN, a/k/a "SHIKE",
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 17, 1967

Before: HASTIE, GANEY and SEITZ, *Circuit Judges.*

OPINION OF THE COURT.

(Filed January 30, 1967)

PER CURIAM:

This appeal from a federal conviction and sentence on a charge of theft of a carton of goods from an airline terminal presents a claim that the defendant's right to the benefit of counsel has been unlawfully abridged.

The accused had retained counsel long enough before trial to permit adequate preparation. On Friday, when the case was called for trial, counsel stated that he was ready for trial but was immediately engaged in trial in another court. The court then stated its unwillingness to permit the accused to remain longer on bail pending trial

and proposed that the trial proceed on Monday. Counsel suggested the possibility that an associate in his office might defend the accused.

The trial began the following Monday and continued to its conclusion with a junior associate of retained counsel acting for the defense.

The record discloses no motion for a continuance and no representation that retained counsel's associate could not adequately get ready over the weekend for the presentation that retained counsel was already prepared to make. Indeed, the substitution of his junior associate was retained counsel's own suggestion.

In all of the circumstances, and particularly in the absence of any objection by counsel either to the substitution of his associate as counsel or to the trial date, we find no abridgement of the defendant's rights in the matter of representation by counsel.

The judgment will be affirmed.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15788

UNITED STATES OF AMERICA

v.

CHARLES SHERMAN, a/k/a "SHIKE",
Appellant

(D. C. CRIMINAL No. 22116)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HASTIE, GANEY and SEITZ, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 15, 1966, be, and the same is hereby affirmed.

Attest: THOMAS F. QUINN,
Clerk.

January 30, 1967.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1204

CHARLES SHERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11-12) is ~~not yet~~ reported at 372 F.2d 131.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1967 (Pet. App. 13). On March 2, 1967, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including

March 30, 1967, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was deprived of his right to assistance of counsel under the Sixth Amendment where, without objection, he was represented by an associate of his retained counsel who was unable to appear because engaged in another trial.

STATEMENT

In a jury trial in the United States District Court for the Eastern District of Pennsylvania petitioner was convicted of theft of an interstate shipment of goods from an air terminal in violation of 18 U.S.C. 659 (App. 1a, 3a).[1] On February 11, 1966, he was sentenced to imprisonment for five years (Pet. App. 9-10). On appeal the conviction was affirmed (Pet. App. 13).

The record shows that after petitioner pleaded not guilty on July 7, 1965, he remained free on bail (App. 1a). When the case was called for trial on January 5, 1966, petitioner informed the court that his attorney, Mr. Gilson, was not present since petitioner had not paid his fee (App. 4a, 5a). The court revoked bail and remanded petitioner to the custody of the marshal (App. 6a). On January 6, the court refused petition-

[1] "App." refers to Appellant's Appendix in the court of appeals.

er's request that he be released so that he could raise money to hire a lawyer, but stated that if petitioner could not get counsel the court would appoint counsel to represent him (App. 7a, 9a). On Friday, January 7, 1966, Mr. Gilson advised the court that he now represented petitioner, requested that bail be reinstated, and requested a continuance because of a trial commitment in a State court which he said would last "probably most of next week" (App. 11a-14a). This colloquy then ensued (App. 14a-15a):

> THE COURT: Then he [petitioner] better get other counsel, because he is either going to go to trial this afternoon or Monday. * * * The case was called. It wasn't ready. I am not going to sit around on it. Now, I will let him out until Monday.
>
> MR. GILSON: Perhaps I can arrange—
>
> THE COURT: Either you better be here Monday or get other counsel for him.
>
> MR. GILSON: Another associate in the office, perhaps, your Honor.
>
> THE COURT: I don't care who you get, but he is going to trial Monday. He should go this afternoon. * * * We will reinstate his bail until 10:00 o'clock Monday morning.

On Monday, January 10, 1966, petitioner appeared in court with Mr. Pelagatti, an associate of Mr. Gilson (App. 16a, 17a). The trial was held on January 11, the following day (App. 23a).

ARGUMENT

Petitioner was not deprived of his right to assistance of counsel in violation of the Sixth Amendment,

as he now contends. There is no conflict between *United States* v. *Johnston*, 318 F.2d 288 (C.A. 6) and the decision below. In *Johnston* the defendant had learned only a few days before trial that the counsel whom he had retained two years earlier would be unavailable on the trial date. Here, on the other hand, six months after petitioner had been arraigned and released on bail, he appeared without counsel when his case was called for trial on January 5. He had not at that late date retained counsel, although he was apparently negotiating for Mr. Gilson's services (App. 5a, 8a). Under these circumstances, the trial court was entirely justified in making it clear that petitioner would not be allowed to delay the trial beyond the week-end. Moreover, unlike the defendant in *Johnston*, petitioner at no time objected to the trial being conducted by Mr. Gilson's associate, Mr. Pelagatti. See *Barber* v. *United States*, 227 F.2d 431 (C.A. 10); *Moore* v. *United States*, 220 F.2d 198 (C.A.D.C.). Mr. Pelagatti was not forced upon petitioner by the trial court, but rather was suggested as a substitute by Mr. Gilson (App. 14a). Petitioner does not contend that Mr. Pelagatti did not have adequate time to prepare for the trial.

In these circumstances the court below properly rejected petitioner's contention that he was deprived of his right to assistance of counsel. *Neufield* v. *United States*, 118 F.2d 375, 383 (C.A.D.C.), certiorari denied, *sub nom. Ruben* v. *United States*, 315 U.S. 798; and see *United States* v. *Bentvena*, 319 F.2d 916, 936 (C.A. 2), certiorari denied *sub nom. Ormento* v. *United States*, 375 U.S. 940.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

APRIL 1967

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